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In the Supreme Court of the United States

October Term, 1982

SAMUEL CALLAHAN, JOHN DALE, TOM COMMON, R. JAMES MATTHEWS, GARRETT JOHNSON, DAVID McLAURIN and EDDIE JAMES CARTHAN,
Petitioners,

vs.

STATE OF MISSISSIPPI,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI STATE SUPREME COURT

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QUESTIONS PRESENTED

A.

Should Certiorari be granted to consider a claim when certain factual questions remain unresolved relative to the State's alleged concession and, alternatively, where the status of James Andrews as Chief of Police has been deemed irrelevant in the prosecution of these petitioners for the assault on James Harris.

B.

Should Certiorari be granted to consider Fourteenth Amendment Due Process claims concerning certain jury instructions when petitioners failed to timely raise an objection on said grounds at the trial level and where the Mississippi Supreme Court in denying post-conviction collateral relief deemed such procedurally barred.

C.

Should Certiorari be granted to consider a claim of ineffective assistance of counsel when the Mississippi Supreme Court dismissed the claim without prejudice for failure to comply with Miss. Sup. Ct. Rule 38.

D.

Should Certiorari be granted to consider Thirteenth, Fourteenth, and Fifteenth Amendments claims of racial discrimination which were barred based upon independent and adequate State procedural grounds.

TABLE OF CONTENTS

Questions Presented I
Table of Contents III
Table of Cases and Authorities IV
Preface 1
Opinions Below 2
Jurisdiction 2
Constitutional and Statutory Provisions Involved 2
Statement of the Case 3
Reasons for Denying the Writ 9

A. Certain Factual Questions Remain Unresolved Relative to the Exact Nature of the State's Alleged Concession and, Alternatively, the Status of James Andrews As Chief of Police Was Irrelevant in the Prosecution of These Petitioners for the Assault on James Harris 9

B. Certiorari Should Be Denied Because This Court Is Precluded From Considering Petitioners' Fourteenth Amendment Due Process Claims Concerning the Failure of the Trial Court to Instruct the Jury on the Lawful Duties and Powers of the Mayor and the Requirements for Lawful Appointment of a Chief of Police Since the Supreme Court of Mississippi Denied Relief on the Basis of an Independent and Adequate State Rule of Procedure 13

C. Certiorari Should Be Denied Because the Petitioners Did Not Comply With Rule 38, Miss. Sup. Ct. Rules, in Presenting Their Claims of Ineffective Assistance of Counsel Resulting in the Dismissal of Their Application on This Ground Without Prejudice 22

D. Certiorari Should Be Denied Because the Question Concerning the Prosecution of Petitioners As a Means of Disenfranchising Black Elected Officials in Violation of the Thirteenth, Fourteenth, and Fifteenth Amendments Was Not Timely Raised and Is, Therefore, Based Upon Independent and Adequate State Procedural Grounds Barred From Review 24

Conclusion 27
Certificate of Service 28
Appendix 1 ..... A-1

TABLE OF CASES AND AUTHORITIES

Cases

Alcorta v. Texas, 355 U.S. 28 ..... 10, 11
Auman v. State, 285 So.2d 146 (Miss. 1973) 8, 18, 26
Baker v. State, 358 So.2d 401 (Miss. 1978) 23
Beck v. Washington, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962) 21
Brown v. State, 275 So.2d 103 (Miss. 1973) 23
Callahan v. State, 419 So.2d 165 (Miss. 1982) 2, 4, 5, 15
Callahan v. State, 426 So.2d 801 (Miss. 1983) 2, 8, 20, 23
Cole v. Arkansas, 333 U.S. 196 ..... 11, 12
Edwards v. Thigpen, Miss. Sup. Ct. Docket No. 53,298 (opinion not yet published, March 23, 1983) 15, 26
Ellis v. Dixon, 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850 (1955) 21
Fay v. Noia, 372 U.S. 391, 428-29, 9 L.Ed.2d 837, 863, 83 S.Ct. 822 (1963) 20, 26

Ferguson v. Georgia, 365 U.S. 570, 5 L.Ed.2d 783, 81 S.Ct. 756 (1961) 21
Fondren v. State, 187 So.2d 327 (Miss. 1966) 18
Gray v. Lucas, 677 F.2d 1086, 1109 (5th Cir. 1982) 21
Henry v. Mississippi, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965) 21
Holloway v. State, 261 So.2d 799 (Miss. 1972) 18, 26
In re Broom's Petition, 251 Miss. 25, 168 So.2d 44 (1964) 18, 26
In the Matter of Marshall Lamkin, 355 U.S. 59, 2 L.Ed.2d 107, 78 S.Ct. 137 (1957) 24
Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966) 21
Martin v. State, 354 So.2d 1114 (Miss. 1978) 16
Minor v. Lucas, 697 F.2d 697 (5th Cir. 1983) 15
Mooney v. Holohan, 294 U.S. 103 .....10, 11
Myers v. State, 268 So.2d 353 (Miss. 1972) 17
Napue v. Illinois, 360 U.S. 264 .....10, 11
Newell v. State, 308 So.2d 71, 78 (Miss. 1975) 17
Parker v. North Carolina, 397 U.S. 790, 25 L.Ed.2d 785, 90 S.Ct. 1458 (1970) 21, 26
Parker v. State, 367 So.2d 456 (Miss. 1976) 15-16
Pittman v. State, 297 So.2d 888 (Miss. 1974) 17
Pyle v. Kansas, 317 U.S. 213 .....10, 11
Stringer v. State, 279 So.2d 156 (Miss. 1973) 16
Thornhill v. State, 246 Miss. 312, 149 So.2d 27 (1963) 18
United States v. Miller, 600 F.2d 498 (5th Cir. 1979) 15
United States v. Sanders, 639 F.2d 268 (5th Cir. 1981) 15
Wetzel v. State, 225 Miss. 450, 76 So.2d 194 (1955) 18
Wheeler v. State, 219 Miss. 129, 70 So.2d 82 (1954) 18
Yates v. State, 189 So.2d 917 (Miss. 1966) 18

Statutes

Miss. Code Anno. § 21-3-1 (1972) 13
Miss. Code Anno. § 25-1-37 (1972) 9
Miss. Code Anno. § 99-35-145(9) (1972) 15, 18

Constitution

Thirteenth Amendment 26
Fourteenth Amendment 5, 11, 26
Fifteenth Amendment 26

Codes

28 U.S.C. § 1257(3) 2

Other Authorities

Fed. R. Crim. P. 30 ..... 15, 16
Fed. R. Crim. P. 52 ..... 15, 16
Miss. Sup. Ct. Rule 6 ..... 16, 25
Miss. Sup. Ct. Rule 11 16
Miss. Sup. Ct. Rule 34 6
Miss. Sup. Ct. Rule 38 ..... 8, 18, 22, 24
Miss. Sup. Ct. Rule 42 17
Miss. Sup. Ct. Rule 45 6
Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979) 18

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Petitioners,

vs.

STATE OF MISSISSIPPI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI STATE SUPREME COURT

I. PREFACE

Petitioners, Samuel Callahan, John Dale, Tom Common, R. James Matthews, Garrett Johnson, David McLaurin and Eddie James Carthan, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Mississippi rendered in an en banc decision dated February 16, 1983, denying their Application for Leave to File a Petition for Writ of Error Coram Nobis.

II. OPINIONS BELOW

Direct Appeal. The opinion of the Supreme Court of Mississippi upholding petitioners' convictions and sentences is reported as *Callahan v. State*, 419 So.2d 165 (Miss. 1982).

State Post-Conviction Decisions, The Supreme Court of Mississippi panel opinion denying petitioners' Application for Leave to File a Petition for Writ of Error Coram Nobis is unpublished and was withdrawn. The en banc opinion of the Court denying the application is reported as *Callahan v. State*, 426 So.2d 801 (Miss. 1983).

III. JURISDICTION

Petitioners seek to invoke the jurisdiction of the Court by way of a Petition for Writ of Certiorari under the authority of 28 U.S.C. § 1257(3). Respondent does not take issue with the jurisdictional requisite as it pertains to proposition A as framed in the State's response; however, jurisdiction is improperly invoked under § 1257(3) as it pertains to questions B, C, and D as framed hereunder. Respondent's position in opposition to jurisdiction is hereinafter set forth in our argument.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have adequately identified and set forth the constitutional and statutory provisions involved in this cause. For the reasons stated in respondent's arguments, the claims raised is proposition B, C, and D are not properly before the Court.

V. STATEMENT OF THE CASE

On October 9, 1980, Samuel Callahan, G. W. Johnson, Dave McLaurin, Eddie James Carthan, John Dale, Tom Common, R. James Matthews, and Garrett Johnson were indicted for aggravated assault on James Harris and James Andrews, law enforcement officers, in the Circuit Court of Holmes County, Mississippi. The Petition *sub judice* deals solely with Cause No. 8328, the assault upon James Harris.

During the course of the proceedings several pre-trial motions were filed including discovery motions and a motion to quash the indictment. The hearing on the motion to quash consumed over one hundred and fifty (150) pages of testimony.

On April 21, 1981, at the conclusion of testimony in a trial that lasted two (2) days, all petitioners were found guilty of the lesser included charge of simple assault on a law enforcement officer.

On May 1, 1981, the petitioners were sentenced to serve terms of three (3) years with the Mississippi Department of Corrections. The sentences of Callahan, Johnson, Dale, Common, and Matthews were suspended, and they were placed on probation conditioned upon payments of fines of Five Hundred Dollars ($500.00) each. McLaurin's was suspended, and he was placed upon probation upon the payment of a One Thousand Dollar ($1,000.00) fine. Carthan was the only petitioner that was required to serve time.

An appeal was taken to the Supreme Court of Mississippi wherein the following assignments of error were raised:

1. The Court erred in denying defendants' motion to quash the indictment on grounds the defendants' ac-

tivities were privileged and did not constitute a crime.

2. The Court erred in not granting appellants' instruction for a directed verdict.

3. The Court erred in denying defendants' motion for a directed verdict on a new trial because of discrepancies in the jury's verdict.

4. The Court erred in granting State's Instruction Nos. 2 and 4.

5. The Court erred in denying defendants' Instruction Nos. 2, 3, 6, 7, 8, 9, and 10.

6. The Court erred in that it improperly instructed the jury on inclusion of a lesser included offense.

7. The verdict of the jury is against the overwlehming weight of the evidence.

8. The verdict of the jury was not unanimous.

Callahan v. State, 419 So.2d 165, 168 (Miss. 1982).

After due consideration of these issues, the Court affirmed the convictions and sentences. *Callahan v. State, supra.*

Of particular significance to the consideration of the matter *sub judice* was the Court's comments on petitioners' constitutional arguments raised for the first time in their brief on direct appeal:

> In their brief, appellants, for the first time, state that the due process rights of appellants under the Fifth and Fourteenth Amendments of the United States Constitution were violated. In the first place, no authority whatever is cited for this contention.

> Furthermore, a constitutional question was not raised in the lower court or in the assignments of error in this Court. Pursuant to the requirements of Mississippi Supreme Court Rule 6(b), we cannot consider such arguments here that were not presented to the lower court, or were not preserved in the lower court and were not advanced on appeal to this Court. Additionally, even assuming that due process question is before this Court, no authority is needed to make a definite conclusion that the charges in the indictment and the hereinabove related evidence on the motion to quash, did not result in the denial of due process rights of appellants. We find that there is no merit in the motion to quash.

Id., at 171.

These comments take on singular importance when viewed in light of the fact that these were the *only* constitutional arguments raised on direct appeal.

Subsequent to oral argument on direct appeal but before an opinion was rendered, petitioners filed a motion for leave to file a supplemental memorandum. The gravamen of the memorandum was that based upon an alleged concession at oral argument by the State that Andrews was not a *de jure* officer at the time of the consultation the defendants were denied due process under the Fourteenth Amendment when the trial court denied Instruction D-6. On August 18, 1982, the motion was denied without opinion.

On or about August 19, 1982, petitioners filed with the Supreme Court of Mississippi an Expedited Application for Stay of Incarceration and Imposition of Fines Pending Filing and Resolution of Petition for Writ of Certiorari. In this application petitioners specifically waived the fil-

ing of a petition for rehearing since every member of the Court had concurred in the opinion. See Application at p. 3.

On August 20, 1982, the application was heard by Bowling, Justice, and was denied based upon Rules 34 and 45, Miss. Sup. Ct. Rules. No petition for rehearing en banc was filed seeking review of the order, and petitioners proceeded to this Court.

On or about August 20, 1982, petitioners filed an Application for Stay of Sentence and Incarceration Pending Petition for Writ of Certiorari. *See*: *Callahan v. State of Mississippi*, Docket No. A-193. In the application petitioners indicated they would raise three (3) points:

1. Whether, the trial court, consistent with the due process clause of the Fourteenth Amendment, was required to instruct the jury on the lawful duties and power of a mayor when that mayor is criminally charged as a result of the exercise of that power?

2. Whether, the trial court, consistent with the due process clause of the Fourteenth Amendment, was required to instruct the jury on the lawful authority of the mayor to superintend all officers and to deal promptly with any neglect of duty?

3. Whether, the trial court, consistent with the due process clause of the Fourteenth Amendment, was required to instruct the jury on the requirements for the lawful appointment of a Police Chief when the appointment became a factual issue at trial and, on appeal, the state concedes the issue?

In response to the application the state pointed out that none of the constitutional questions posed had been

properly predicated in the State Courts; therefore, there was not a reasonable probability that four (4) justices would vote to grant certiorari.

Sitting as Circuit Justice, the Honorable Byron R. White denied the application without opinion. As of this date, no petition has been filed with this Court to review the decision of the Supreme Court of Mississippi on direct appeal.

On October 4, 1982, petitioners initiated their post-conviction collateral attack now before this Court for review. In their Application for Leave to File Petition for Writ of Error Coram Nobis petitioners raised four (4) assignments of error. These were:

1. It was a violation of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution to fail to instruct the jury on the lawful duties and powers of the mayor and of the requirements for the lawful appointment of a police chief.

2. It was violation of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution to obtain a conviction by the use of acknowledged untruths at trial and on appeal, affirm their conviction on considerations different from those raised at trial.

3. The constitutional issues arising from the state's concession at oral argument were duly presented to this court. The issues not presented in constitutional terms denied petitioners' effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

4. The State's use of the criminal process to prosecute a mayor for the exercise of his powers is the most recent tactic by the State of Mississippi to frustrate the reconstruction amendments. This tactic is violative of the petitioners' rights under the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution.

See Petitioners' Petition for Rehearing.

On November 10, 1982, the Supreme Court of Mississippi in a rather obfuscated opinion denied the petition relying upon the rule announced in *Auman v. State*, 285 So.2d 146 (Miss. 1973). Cross-petitions for rehearing were filed, and responses to each requested by the Court. On February 16, 1983, the Court en banc denied the application holding that grounds one and four were procedurally barred, that ground two was without merit and that petitioners had failed to comply with Miss. Sup. Ct. Rule 38, and that consequently, the issue of ineffective assistance of counsel was not properly before them. *Callahan v. State*, 426 So.2d 801 (Miss. 1983).

In this posture petitioners now seek review by this Court.

VI. REASONS FOR DENYING THE WRIT

A.

Certain Factual Questions Remain Unresolved Relative to the Exact Nature of the State's Alleged Concession and, Alternatively, the Status of James Andrews As Chief of Police Was Irrelevant in the Prosecution of These Petitioners for the Assault on James Harris

The writ should be denied under petitioners' reason "A", page 19 of the petition, for two (2) reasons. First, the identical issue presented here is presently pending in a habeas corpus petition filed by petitioner Carthan in Civil Action No. J82-0679(R) in the United States District Court for the Southern District of Mississippi, Jackson Division.[1] We respectfully submit that said forum is better equipped than this Honorable Court to reconcile an unresolved factual dispute inherent in this issue, i.e., the exact nature and scope of the State's so-called "concession" at oral argument of the direct appeal.[2] This Court's valuable and overburdened judicial time should not be further burdened by reviewing a state court decision that contains an unresolved factual dispute that is presently pending and in

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1. Likewise, the other claims presented by this petition are also pending in the habeas court.

2. For example, we disagree with petitioners' bald allegations that the state conceded on argument that false evidence was used at trial and that it admitted that there was an "unlawful usurpation of a town's police department". Supplemental Brief to Petition, p. 6. On the contrary, the state's only concession pertained to the failure of the proof to show that the statutory requirements for the appointment of a *de jure* chief of police were met. Rather, the state argued that Andrews' appointment met the requirements of a *de facto* officer under MCA 1972, § 25-1-37, and therefore his actions were completely lawful.

due course likely will be resolved in a federal habeas court.

Second, the writ should be denied under reason "A" because, contrary to petitioners' assertions, the decision of the Supreme Court of Mississippi is not in conflict with the previous decisions of this Court cited by petitioners. Said decisions are factually and legally distinguishable.

The cases cited by petitioners, *Napue v. Illinois*, 360 U.S. 264; *Alcorta v. Texas*, 355 U.S. 28; *Pyle v. Kansas*, 317 U.S. 213; and *Mooney v. Holohan*, 294 U.S. 103, involved either the use by the state at trial of testimony or evidence that it knew to be false and the suppression of evidence that would have refuted or impeached said testimony or evidence, or the failure of the state to correct testimony or evidence that it knew to be false. In each case, the defendant was ignorant of the false testimony or evidence when introduced, was not guilty of a lack of diligence in discovering its falsity, and the jury was unaware of facts which would have refuted or impeached the falsity.

Contrary to the cited cases, there is no proof in the case at bar that the state knowingly used false testimony or evidence to convict petitioners or that false testimony or evidence was knowingly allowed to go to the jury uncorrected. The facts surrounding the appointment of Andrews as chief of police were fully aired before the jury, *and nothing pertaining to that appointment ever has been conceded by the state to be false or shown to be false by petitioners.* As previously stated, the only concession made by the state at oral argument on direct appeal pertained to the failure of the state's evidence to prove that Andrews' appointment sufficiently met the statutory requirements necessary to qualify him as a de

jure officer. The state argued, consistently with the evidence presented at trial, that Andrews had *in fact* been appointed chief by a majority of the Board of Aldermen for the town, that this fact was known by Officer Harris and that under state law, Andrews' acts as a *de facto* officer were lawful. Alternatively, the state argued, and the Supreme Court of Mississippi found, that the *de jure* status of Andrews was not determinative of the outcome of the assault convictions of James Harris. Nothing inherent in this argument or decision is even closely akin to the use of false testimony found to exist and violate due process in this Court's decisions in *Napue, Alcorta, Pyle* and *Mooney, supra.* Consequently, there is nothing in the decision at bar that conflicts with said decisions requiring or meriting review on certiorari.

Nor does the Mississippi Court's decision conflict with *Cole v. Arkansas,* 333 U.S. 196. In *Cole* the state appellate court affirmed the petitioner's convictions under a section of a criminal statute that was separate, distinct and substantially different from the section under which they had been indicted, tried and convicted in the trial court. These two (2) separate offenses contained different elements and proof, and the theory of prosecution consequently was different for each. Needless to say, this Court found that affirmance under such circumstances violated petitioners' due process rights guaranteed by the Fourteenth Amendment.

On the contrary, in the case at bar petitioners' convictions were prosecuted from inception in the lower courts to finality in the appellate court as an assault upon the person of James Harris not Jim Andrews. Nothing that occurred at trial or in the Supreme Court changed either the elements of the crime or the "theory" of the state's case. The "theory" that the status of James Harris as

a police officer acting within the scope of his duty depended *exclusively* upon the *de jure* status of Jim Andrews was injected into the case for the first time on appeal by the petitioners not by the state.[3] The state simply never contended at trial or otherwise that Andrews' *de jure* status was outcome determinative on the issue of the factual and legal status of James Harris and hence petitioners' convictions,[4] consequently, the affirmance by the Supreme Court of Mississippi on the same charge and theory upon which the case was prosecuted at trial does not conflict with this Court's decision in *Cole, supra,* and certiorari review is not merited on this basis.

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3. This is not to suggest that Andrews' status as a *de jure* officer was irrelevant to the state's theory of the case. Even though the state was not required to prove that Harris' status depended exclusively upon the status of Andrews, it was certainly permissible for the state to prove that Andrews' appointment met all of the statutory requirements and that Harris' status did in fact flow from said appointment. However, that the state's proof of Andrews' *de jure* status failed does not change the legal or factual basis of the prosecution. Nothing in *Cole* even remotely suggests that the state is precluded by the due process clause from prosecuting on a factually alternative basis.

4. The city clerk's testimony, cited by petitioners on page 4 of their supplemental brief, is not to the contrary. Her testimony was as equally relevant on the issue of Andrews' *de facto* status as it was his *de jure* status. Regardless, the decisive factor here is that the state did not request and the court did not give instructions informing the jury that Andrews' status was determinative of the outcome of the charge involving Harris.

B.

Certiorari Should Be Denied Because This Court Is Precluded From Considering Petitioners' Fourteenth Amendment Due Process Claims Concerning the Failure of the Trial Court to Instruct the Jury on the Lawful Duties and Powers of the Mayor and the Requirements for Lawful Appointment of a Chief of Police Since the Supreme Court of Mississippi Denied Relief on the Basis of an Independent and Adequate State Rule of Procedure

The second question posed by petitioners concerns an alleged failure of the trial court to instruct the jury on questions of purely state law; i.e., (1) the lawful duties and authority of a mayor and (2) the requirements for the lawful appointment of a Chief of Police.

At trial petitioners tendered for the Court's consideration seven (7) instructions concerning the duties and authority of a mayor of a code chartered municipality under Miss. Code Anno. § 21-3-1 *et seq.* (1972) and one concerning the legal requirements for the appointment of a chief of police. Of these eight (8) instructions, four (4) were refused as abstract statements of the law,[5] three (3) were withdrawn,[6] and one (1) was included in the Court's charge to the jury.[7]

On direct appeal petitioners assigned as error the trial court's refusal to grant Instru ons D-2, D-3, D-6, D-8, and D-9. However, the substance of the argument rested upon State authority. No constitutional arguments were advanced or cases predicated upon such cited.

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5. See Instructions D-2, D-3, D-6, D-8, and D-9. (R. 328-29, 332, 334)

6. See Instructions D-4, D-5, and D-7. (R. 330-31, 333)

7. See Instruction D-4. (R. 353)

In affirming the trial judge's refusal of proffered instructions, the Mississippi Supreme Court held:

> The above set out instructions, the refusal of which is complained of by appellants as being erroneously refused, clearly were erroneous. They all were abstract statements of law, mostly the quoting of statutes describing the duties of municipal officials, principally the mayor. We have held in many cases that abstract instructions such as the ones complained of here should not have been given. *Harkins v. Paschall,* 348 So.2d 1019 (Miss. 1977); *Freeze v. Taylor,* 257 So.2d 509 (Miss. 1972); *New Orleans J. & G. N. R. Co. v. Statham,* 42 Miss. 607 (1869); 53 Am. Jur., *Trial* § 573, p. 451 (1945); 38 Am. Jur., *Negligence* § 370, p. 1089 (1941). The trial judge granted defendants' Instruction No. D-4 which was not in the abstract and included the matters sought to be placed before the jury in the refused instructions. D-4 reads as follows:
>
> > The court instructs the jury that if you find from the evidence that the Mayor, Eddie J. Carthan believed a breach of the peace was taking place in the Town of Tchula on April 30, 1980, and because of his belief, the Mayor exercised his lawfully (sic) authority to call on the policemen and other citizen (sic) to aid in enforcing the laws and that the acts, if any, of Eddie James Carthan, John Dale, Samuel Callahan, David McLaurin, Tom Common, R. James Matthews, and Garrett Johnson toward James Harris were justified and necessary in discharging the legal duty of the Mayor or in lawfully keeping and preserving the peace, then you shall find the defendants "not guilty."

> In addition to refusing Instruction No. 6 as being in the abstract and not related to other facts necessary for consideration by the jury, the instruction relates only to the controversy as to whether or not Jim Andrews had fully qualified as chief of police on the night in question. As we have seen, this case does not involve an alleged attack on Andrews and is not determined by whether or not he was fully qualified by not performing the acts set out in the instruction. The indictment and the trial were for an alleged attack on an admittedly full-time policeman, James Harris. The question for the jury to have considered was whether or not Harris, admittedly on twenty-four-hour service, was acting in the furtherance of that service and his duty at the time of the alleged assault. The jury was fully instructed on this question.
>
> *Callahan v. State, supra,* 419 So.2d at 176-77.

The argument now advanced by petitioners was raised for the first time in their application for post-conviction relief.

In Mississippi post-conviction collateral relief is obtained by way of a Writ of Error Coram Nobis. See Miss. Code Anno. § 99-35-145 (1972); *Edwards v. Thigpen,* Miss. Sup. Ct. Docket No. 53,298 (opinion not yet published, March 23, 1983); *Minor v. Lucas,* 697 F.2d 697 (5th Cir. 1983).

Like the Federal Courts, the Mississippi Courts will not recognize errors or objections unless a timely challenge is raised. See Rules 30 and 52, Fed. R. Crim. P.; *United States v. Sanders,* 639 F.2d 268 (5th Cir. 1981); *United States v. Miller,* 600 F.2d 498 (5th Cir. 1979); *Parker*

v. State, 367 So.2d 456 (Miss. 1976); *Martin v. State*, 354 So.2d 1114 (Miss. 1978); *Stringer v. State*, 279 So.2d 156 (Miss. 1973). Like its federal counterparts, Rules 30 and 52, Fed. R. Crim. P., the state practice is based upon specified rules of procedure.

Rule 6, Miss. Sup. Ct. Rules, provides:

Assignments of Error

(a) The appellant shall file an assignment of error on or before the due date of appellant's brief, as provided infra in Rule 7, Subsection (2). The assignment of errors shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel. Cross-appeals may be taken without bond, by the appellee and cross-appellant by filing his cross-assignment of errors at the time the brief of appellee is due under Rule 7.

(b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

Likewise, Rule 11, Miss. Sup. Ct. Rules, states:

No Reversal for Harmless Error

No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

In specific reference to jury instructions, the Court provided in Rule 42, Miss. Sup. Ct. Rules, for the following:

> *Instructions*
>
> The judges of the circuit courts of Mississippi have adopted uniform rules of procedure for the circuit courts, and among those rules adopted is Rule 14 requiring attorneys to file jury instructions with the circuit clerk and to deliver copies of the instructions proposed to be given the jury to opposing counsel before the trial. The rule further provides that attorneys are required to dictate their specific objections to an instruction offered, thus giving the trial judge an opportunity to pass upon the objections before the case is argued before the jury.
>
> After considering the foregoing rule, we are convinced that it will aid in promoting better judicial procedure and should be implemented by this Court. It is, therefore, the rule of this Court that no assignment of error based on the giving of an instruction to the jury will be considered on appeal unless specific objection was made to the instruction in the trial court stating the particular ground or grounds for such objection. However, in extreme cases this Court may raise an objection to a jury instruction in order to prevent manifest injustice.

Supplementing this rule, the Mississippi Supreme Court held in *Newell v. State,* 308 So.2d 71, 78 (Miss. 1975) that a "trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so." Succinctly stated, contemporaneous objection is necessary to preserve a point on appeal. *Pittman v. State,* 297 So.2d 888 (Miss. 1974); *Myers v. State,* 268 So.2d 353 (Miss. 1972).

As previously mentioned, like Ohio in *Engle*, Mississippi provides only limited collateral review of convictions. *In re Broom's Petition*, 251 Miss. 25, 168 So.2d 44 (1964). In a post-conviction context prisoners may not raise claims that could have been litigated before judgment or on direct appeal, *Holloway v. State*, 261 So.2d 799 (Miss. 1972), nor may they raise claims which have been heretofore litigated. *Auman v. State*, 285 So.2d 146 (Miss. 1973); *Wetzel v. State*, 225 Miss. 450, 76 So.2d 194 (1955); Miss. Code Anno. § 99-35-145(9); Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979). Additionally, a prisoner must use diligence in the presentation of his petition and delayed, successive, or dilatory petitions are barred. *Wetzel v. State, supra; In re Broom's Petition, supra; Holloway v. State, supra.*

As previously mentioned, the procedure for filing a post-conviction collateral petition in Mississippi is set forth in § 99-35-145, Miss. Code 1972, Annotated and Amended and Rule 38, Mississippi Supreme Court Rules. In situations like the matter *sub judice* where an appeal was taken to the Mississippi Supreme Court, the prisoner must file an application with the Court for leave to file a petition for a writ in the court of original jurisdiction. Once the pleading requirements are met, the Court will then examine the case to determine whether a case for relief or probable cause can be made out. *Wheeler v. State*, 219 Miss. 129, 70 So.2d 82 (1954); *Thornhill v. State*, 246 Miss. 312, 149 So.2d 27 (1963); *Fondren v. State*, 187 So.2d 327 (Miss. 1966). In ascertaining whether a claim for relief can be made the Court will consider the application, petition, briefs, affidavits, and all previous proceedings involving the same matter which had been filed with the Court. *Yates v. State*, 189 So.2d 917 (Miss. 1966); *Wheeler v. State, supra.*

In summarizing these rules the Mississippi Supreme Court in the instant matter stated:

> We first address the petition for writ of error coram nobis by recognizing a basic premise in this jurisdiction that such post-conviction petitions are limited in nature. Justice Ethridge, in the case of *In re Broom's Petition,* 251 Miss. 25, 168 So.2d 44 (1964), set forth the circumstances in which a writ for error coram nobis would lie. His opinion states:
>
> > The general scope of a petition for writ of error coram nobis, or motion in the nature thereof, is to bring before a court a judgment previously rendered by it, for the purpose of review or modification. *There must be some error of fact and not of law* affecting substantially the validity and regularity of the proceedings, *which was not brought into issue at the trial. Such motion or petition is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record, not available by appeal or otherwise, and not discovered until after rendition of the judgment, without fault of the party seeking relief. It is an attack on a judgment of conviction, valid on its face, but defective by reason of facts outside the record, which deprived accused without fault on his part of the constitutional right to a fair trial.* [Emphasis added]. [251 Miss. at 32-33, 168 So.2d at 48].
>
> With this background in mind, our Court has since ruled that the writ of error coram nobis will not be allowed to relitigate questions of law or fact already decided by this Court. *Auman v. State,* 285 So.2d 146 (Miss 1973). Moreover, "a defendant in a criminal trial may not deliberately hold back matters known to

> him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again." *Holloway v. State,* 261 So.2d 799, 800 (Miss. 1972).
>
> *Callahan v. State, supra,* 426 So.2d at 803.

Consequently, the Court held that the petitioners' first assignment of error concerning the failure of the trial judge to grant certain requested instructions had been raised on direct appeal and that the Court could not reconsider the same factual question in a post-conviction collateral setting recast in constitutional terms. The Court stated:

> The same issue was raised by the petitioners on appeal. 419 So.2d at 176. The proper time to reconsider such an issue would have been on a rehearing of the appeal, but the petitioners failed to file for a rehearing. They cannot now attempt to relitigate a question of law already decided on appeal by this Court through a petition for writ of error coram nobis.
>
> *Callahan v. State, supra,* 426 So.2d at 803.

In this context we review the authority of this Court to review the decision of the Mississippi Supreme Court on this point. A cogent summary of the pertinent principles is found in *Fay v. Noia,* 372 U.S. 391, 428-29, 9 L.Ed.2d 837, 863, 83 S.Ct. 822 (1963):

> It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds. See, e.g., NAACP v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163; Fox Film Corp. v. Muller, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183. Section 25 of the Judiciary Act of 1789, c 20, 1 Stat. 85-87, denied this Court power to base the reversal of a state court decision on any error other

"than such as . . . immediately respects . . . questions of validity or construction of the said [Federal] constitution, treaties, statutes, commissions, or authorities in dispute." The deletion of the express restriction by the Judiciary Act of February 5, 1867, c 28, § 2, 14 Stat. 386-387, did not enlarge this Court's power in that regard. Murdock v. Memphis (US) 20 Wall 590, 22 L.Ed. 429. Murdock was a case involving state substantive grounds, but the principle is also applicable in cases involving procedural grounds. See, e.g., Herb v. Pitcairn, 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459; Davis v. Wechsler, 263 U.S. 22, 68 L.Ed. 143, 44 S.Ct. 13; Ward v. Board of County Comrs., 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419. Thus, a default such as Noia's, if deemed adequate and independent (a question on which we intimate no review), would cut off review by this Court of the state coram nobis proceedings in which the New York Court of Appeals refused him relief. It is contended that it follows from this that the remedy of federal habeas corpus is likewise cut off.

See also: *Parker v. North Carolina*, 397 U.S. 790, 25 L.Ed. 2d 785, 90 S.Ct. 1458 (1970); *Johnson v. New Jersey*, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966). Accord *Henry v. Mississippi*, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965); *Beck v. Washington*, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962); *Ferguson v. Georgia*, 365 U.S. 570, 5 L.Ed.2d 783, 81 S.Ct. 756 (1961); *Ellis v. Dixon*, 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850 (1955).

The conclusion is, therefore, obvious. Because petitioners had failed to raise their constitutional objection in a timely fashion, collateral relief was unavailable. This State rule of practice constitutes an adequate state ground precluding review by this Court. Cf. *Gray v. Lucas*, 677 F.2d 1086, 1109 (5th Cir. 1982).

C.

Certiorari Should Be Denied Because the Petitioners Did Not Comply With Rule 38, Miss. Sup. Ct. Rules, in Presenting Their Claims of Ineffective Assistance of Counsel Resulting in the Dismissal of Their Application on This Ground Without Prejudice

Rule 38, Miss. Sup. Ct. Rules, provides for the following:

> Every application for leave to five a petition for writ of error coram nobis in the lower court shall have attached thereto the original and two executed counter-parts of the petition proposed to be filed in the lower court, which shall be sworn to by petitioner. Petitioner's affidavit shall designate specifically what facts, if any, alleged in the petition are within the personal knowledge of petitioner. When the petition contains allegations of fact not within the personal knowledge of petitioner, it shall have attached affidavit or affidavits of some other person or persons having knowledge of the facts which are not within the personal knowledge of petitioner. The failure to attach such affidavits of persons other than petitioner may be excused upon good cause shown. The petition shall state when the facts relied upon for issuance of the writ came to petitioner's knowledge, and shall state sufficient facts to show that there was no want of reasonable diligence on the part of petitioner or his counsel. The petition shall be endorsed by a statement by petitioner's counsel, if any, that he believes the petition for writ of error coram nobis is well taken, and should be issued. The application shall be supported by a brief, and failure to file a supporting brief may be ground for dismissal. In the event leave

is granted to file the petition the original and one executed counterpart of the petition shall be withdrawn and filed in the lower court.[8]

In dismissing petitioners' claims of ineffective assistance of counsel without prejudice, the Mississippi Supreme Court stated:

> In analyzing the allegations of ineffective assistance, we note that the petition assigns the above enumerated shortcomings in very broad general terms. No allegation with specificity is given as to which unnamed witnesses were available, what witness would corroborate testimony, what preparation or investigation was omitted, what testimony was hearsay, what instructions of the law were omitted, or what objections to testimony were overlooked by defense counsel.
>
> In addition to the above inadequacies the defendants failed to show how their case was prejudiced by such omissions with specificity. The petitions make no such allegation of how the outcome of the proceedings would have been altered had counsel performed differently.
>
> Since the application fails to state, with specificity, the grounds of ineffective assistance of counsel and the resulting prejudice to the petitioners' defense, we are unable to grant the petitioners leave to file a petition for writ of error coram nobis with the lower court. Miss. Sup. Ct. Rule 38. However, the petitioners are granted leave to file a new application and affidavits showing more specific examples of ineffective counsel, if any, and of resulting prejudice.

Callahan v. State, supra, 426 So.2d at 805-6.

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8. See also: *Baker v. State,* 358 So.2d 401 (Miss 1978); *Brown v. State,* 275 So.2d 103 (Miss. 1973).

A similar situation was presented to this Court in the case of *In the Matter of Marshall Lamkin*, 355 U.S. 59, 2 L.Ed.2d 107, 78 S.Ct. 137 (1957), wherein the Court in a per curiam opinion held:

> The petition for writ of certiorari is denied. The judgment below rests on an adequate state ground since petitioner, in filing his application for habeas corpus in the state court, failed to comply with applicable state procedures. *See*: *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L.Ed.2d 158, 56 S.Ct. 183 (1953).

The logic underpinning Rule 38 is simple. In order for the Court to make a determination of probable cause to issue leave to proceed it must be provided with sufficient facts to ascertain that the allegations are not frivolous or patently false.

The Court in its decision has outlined those items upon which petitioners should elaborate in any new petition.

Consequently, the decision of the State Court rests upon adequate state procedural grounds, and certiorari should be denied.

D.

Certiorari Should Be Denied Because the Question Concerning the Prosecution of Petitioners As a Means of Disenfranchising Black Elected Officials in Violation of the Thirteenth, Fourteenth, and Fifteenth Amendments Was Not Timely Raised and Is, Therefore, Based Upon Independent and Adequate State Procedural Grounds Barred From Review

Succinctly stated, petitioners complain that the prosecution of the case against them was simply another chapter in what they label the "Mississippi Plan" to disenfranchise

black voters. Stated simply, the prosecution of these people in this case was an intentional act of racial discrimination. Prior to trial, petitioners filed a motion to quash the indictment claiming among other things that the State arbitrarily chose to prosecute the case against them. No constitutional grounds were urged in support thereof.

On direct appeal petitioners questioned the trial judge's denial of the motion and for the first time in somewhat cryptic language suggested constitutional error. However, the entire corpus of the argument consisted of the following:

> Defendants assert that they have been denied a fair trial [sic], that their due process rights under the 5th and 14th amendments [sic] to the United States Constitution have been violated. The State, by choosing to prosecute the defendants in granting their opponents imunity [sic] has denied these defendants the equal protection of the law. A study of the transcript of the hearings reveals a remarkable record totally void of any basis on which the verdict of the jury can be supported. Defendants [sic] claim is based upon the failure of the trial court to quash the indictments or to instruct the jury in accordance with the applicable law on the statutory authority of the Mayor and those acting in pursuant to his command.
>
> Appellants' Brief at p. 3.

As previously stated the Court held that this argument was procedurally barred for several reasons; i.e., failure to cite authority and failure to comply with Rule 6(b), Miss. Sup. Ct. Rules.

The instant proposition is nothing but a rehash of the issues raised on direct appeal recast in the terms of

the Thirteenth, Fourteenth, and Fifteenth Amendments - discriminatory prosecution.

As has been previously discussed, State procedure requires a prisoner to raise all questions of law to a particular set of facts at the time of trial. *Edwards v. State, supra*; *Auman v. State, supra*; *Holloway v. State, supra*; *In re Broom's Petition, supra.*

The court below denied relief on this point holding that claims of discriminatory and selective prosecution had been raised on direct appeal, although on other grounds. Consequently, the assignment could not meet the "error in fact" requirement of *In re Broom's Petition, supra.*

Consequently, as a State rule of practice this would constitute an adequate State ground precluding this Court from reaching this issue on collateral relief. *See*: *Fay v. Noia, supra*; *Parker v. North Carolina, supra.*

In summary, the issue of whether the State of Mississippi is attempting to disenfranchise black voters by prosecuting these defendants is a violation of the Thirteenth, Fourteenth, and Fifteenth Amendments should have been raised at the trial level and cannot be raised for the first time in a post-conviction collateral petition.

VII. CONCLUSION

The petitioners' contentions pose no question of particular moment or indecision in the case law of the land, and it is, therefore, respectfully submitted that the Petition for Writ of Certiorari in all justice should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William S. Boyd, III, a Special Assistant Attorney General for the State of Mississippi and Counsel of Record for the Respondent herein, do hereby certify that I have this day caused three (3) true and correct copies of the above and foregoing Response to Petition for a Writ of Certiorari to be served upon the following:

Morton Stavis, Esquire
Ellen Yaroshefsky, Esquire
Center for Constitutional Rights
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New York, New York 10003

and

Charles Victor McTeer, Esquire
McTeer & Bailey, P.A.
Post Office Box 1835
Greenville, Mississippi 38701
Attorneys for Petitioners

This, the 28th day of April, 1983.

WILLIAM S. BOYD, III
Special Assistant Attorney General
State of Mississippi

APPENDIX 1

MCA 1972, § 25-1-37. *Acts of de facto officer valid.*

The official acts of any person in possession of a public office and exercising the functions thereof shall be valid and binding as official acts in regard to all persons interested or affected thereby, whether such person be lawfully entitled to hold the office or not and whether such person be lawfully qualified or not; but such person shall be liable to all the penalties imposed by law for usurping or unlawfully holding office, or for exercising the functions thereof without lawful right or without being qualified according to law.